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November 23, 1999

By Courier

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

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NOV 23 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *Ex Parte* Presentation  
Application for Consent to Transfer Control of  
Sprint Corporation to MCI WorldCom, Inc.  
CC Docket No. 99-333

Dear Ms. Salas:

On behalf of Telstra Corporation Ltd. (Telstra), and pursuant to Section 1.1206 of the Commission's Rules, this will advise that on November 22, 1999, Lionel Taylor, Manager-International Internet Strategy, Global Wholesale, Telstra, and I discussed Telstra's concerns regarding the completeness of the above-referenced application and the public interest review procedures which the agency might adopt for the application with the following members of the FCC's International Bureau: Matthew Vitale, Jacquelyn Ruff, J. Breck Blalock, Joanna Lowry, George Li and Helen Domenici.

Telstra advised the staff that it would be premature to invite public comment on the application docketed on November 17, 1999, by Sprint Corporation (Sprint) and MCI WorldCom, Inc. (MCI WorldCom) because the applicants had apparently omitted, by intention, any relevant information regarding: (a) the parties' current provision of Internet backbone services to downstream Internet Service Providers (ISPs), such as Telstra, including the provision of international private lines (IPL) services required for backbone access; and (b) the competitive impact which a combination of their services might have, despite the fact that competitive impact of the proposed merger on the Internet is of central importance to a balanced public interest review of the application under the Communications Act.

Telstra said that, based upon the text of the November 17 application, the parties apparently wished to bypass a meaningful FCC review of the Internet aspects of the proposed merger or,

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alternatively, to have the FCC (and the public) conduct a piecemeal review of the merger, by initially submitting relevant information on their Internet backbone and related IPL services to the Department of Justice ("DOJ"). Telstra stated that at page 6 of the merger application, the parties noted that, although they were cognizant that the merger of their Internet backbone businesses presented "similar policy issues" to those raised in connection with the prior proposal to combine the MCI and WorldCom backbone businesses, the current transaction "would be scrutinized by the DOJ." And, "the *result* of that scrutiny will be reported to this Commission promptly upon *resolution*." (Emphasis supplied) As such, Telstra stated that it appeared that the parties were improperly seeking to circumvent the FCC public notice and comment process which ordinarily would be triggered by their application for the Internet aspects of the merger, notwithstanding the FCC's jurisdiction over the basic telecommunication facilities involved (e.g., IPLs and domestic transmission facilities which underlie the parties' Internet backbone services).

Telstra went on to state that unless the FCC required the parties to docket adequate information regarding their current and proposed Internet backbone services a balanced and complete public interest review of the merger would not be possible, and that the Commission might well be faced with "rubber stamping" any future arrangement which the parties might agree to with the DOJ as to the Internet issues, notwithstanding the independent communication policy issues any such "resolution" might raise. Given the likely timetable for the DOJ review process, and the extraordinary financial stakes attendant to the merger – the merger is reportedly worth approximately \$130 billion – Telstra stated that by the 2d Quarter of 2000, even though the DOJ review might still be pending, the FCC would likely face growing pressure to act in an expeditious fashion. In that regard, Telstra noted that the significant communication policy issues raised by the prior MCI divestiture of its Internet backbone business to Cable & Wireless (C&W) – namely, the provision of the core Internet transmission facilities to C&W on a private carrier basis – had been proposed by MCI following the close of public comments on an *ex parte* basis only weeks before the divestiture was to be effected, and thus had escaped any meaningful public interest review or scrutiny by the full Commission. By way of background on this matter, Telstra provided the Commission's staff with a copy of the September 10, 1998 letter which counsel for Telstra had filed in the MCI-WorldCom merger docket, a copy of which is attached hereto.

In addition, Telstra stated that the parties' apparent attempt to control the timetable and scope of the FCC's review of Internet backbone issues was particularly incongruous given Sprint's 1998 submissions to the FCC in connection with the proposed combination of the MCI and WorldCom backbone businesses. More specifically, Telstra noted that on March 13, 1998, Sprint had docketed comments which strongly opposed a combination of the MCI and WorldCom backbone facilities and expressly acknowledged the Commission's jurisdiction over the matter:

"[W]hile services provided on the Internet may be enhanced, the direct threat to competition here is created by the consolidation of WorldCom's and MCI's core Internet backbone facilities over which such services are transported. As the Joint

Magalie Roman Salas

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Lastly, Telstra noted that international private line facilities are an essential portion of the Internet backbone services which MCI WorldCom and Sprint now offer; without the international portion of the backbone, off-shore ISPs, such as Telstra, would not be able to obtain backbone access especially where, as is the case for MCI WorldCom, Telstra is offered international transmission and Internet access (port charges) on a bundled basis. As well, Telstra noted that the FCC's most recent statistics showed that in 1998, MCI WorldCom had approximately 47% of the IPL market, in terms of revenues, and Sprint had a market share of approximately 13%. Thus, the combination of these two carriers' IPL business would create by far the largest IPL carrier in the market.<sup>4</sup>

Taking into account the foregoing factors, Telstra strongly urged the staff to take such steps as they might deem necessary to ensure that the parties docketed adequate information regarding the Internet and related IPL aspects of the proposed merger and that said materials were subject to public comment and Commission review at the same time as the other public interest issues raised by the merger. The Commission, rather than the parties, said Telstra, should determine the scope and the timetable of the public interest review process.

Sincerely,

  
Gregory C. Staple

Enclosure

cc: Michelle Cary  
Matthew Vitale  
Jacquelynn Ruff  
Joanna Lowry  
J. Breck Blalock  
George Li  
Helen Domenici

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<sup>4</sup> See "Preliminary 1998 Section 43.61 International Telecommunications Data," October 1999, Industry Analysis Division, FCC at Fig. 7. A copy of relevant portions of the FCC's statistical report on the IPL market was also furnished to the staff.

Applicants concede, these are basic, garden variety transmission facilities indistinguishable from those used to carry traffic on the PSTN.”<sup>1</sup>

In addition, Telstra noted that the FCC’s prior decision in CC Docket No. 97-211 approving the WorldCom-MCI merger also acknowledged that the agency had jurisdiction over the provision of Internet backbone providers (IBPs) and that the services offered by IBPs “constitute a separate relevant product market” for purposes of its review.<sup>2</sup> In that order, the FCC went on to say that a combination of the MCI and WorldCom backbone businesses raised significant competition issues because “there do not appear to be good demand substitutes for ISPs and regional backbone service providers to obtain national Internet access without access to IBPs.” *Ibid.* Under these circumstances, Telstra stated that a combination of the MCI WorldCom and Sprint IBP businesses would raise exactly the same issues and the parties likewise should be obliged at the outset to docket adequate information on their current and proposed services in this market.<sup>3</sup>

Telstra also noted that because the FCC had previously found that Internet backbone providers had market power (that is, there were no good substitutes), the U.S. Internet backbone was the functional equivalent of the telephone company “local loop” for downstream ISPs, such as Telstra. It follows, said Telstra, that so long as IBPs have such market power, the Commission could not approve a combination of IBP facilities absent close scrutiny of the terms and conditions on which they offer service to other ISPs.

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<sup>1</sup> *Ibid.* at p.ii. A copy of Sprint’s submission was also provided to the staff together with a copy of Sprint’s subsequent June 1, 1998, *ex parte* filing memorializing a presentation made to various Commission staffers, including Richard Metzger, then Chief of the Common Carrier Bureau. Mr. Metzger, now a principal with Lawler, Metzger and Milkman LLC, executed the Sprint-MCI WorldCom transfer of control application.

<sup>2</sup> See Memorandum, Opinion and Order, CC Docket No. 97-211, FCC 98-225, released September 14, 1998, at ¶ 148.

<sup>3</sup> Pursuant to ¶ 161 of the MCI-WorldCom merger order, Telstra stated that this information should include a description of the terms on which backbone services are currently provided to C&W and the extent to which any portion of said backbone services involve services which previously were offered to C&W on a common carrier basis. (Under Section 214 of the Communications Act, as detailed in Telstra’s September 10, 1998 FCC letter referenced earlier, a carrier must seek prior agency approval to withdraw common carrier transmission facilities from service.) In the MCI-WorldCom merger order, the FCC stated that “should the Commission discover that MCI is not in compliance with our tariffing rules, we have the ability to initiate our own investigation.” *Ibid.*

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September 10, 1998

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By Hand Delivery

Michelle M. Carey  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, D.C. 20554

Re: Ex Parte In CC Docket No. 97-211

Dear Mr. Krattenmaker and Ms. Carey:

This is written on behalf of Telstra Corporation Limited (Telstra) further to an ex parte telephone conference I had with both of you on September 8, 1998 regarding the terms on which MCI Communications Corporation (MCI) proposes to divest its Internet business to Cable & Wireless plc (C&W) as a precondition to merging with WorldCom, Inc. (WorldCom).

During that conversation, I stated that Telstra opposed the divestiture as currently proposed because, following C&W's acquisition of MCI's Internet business, MCI would provide C&W basic telecommunication services, including international private line (IPL) services, on "favorable" terms and without filing an appropriate tariff. I stated that any "private carriage" exemption which might be claimed by MCI or C&W for such services were belied by the service description provided in the "Term Sheet" filed by MCI in confidence on or about August 25, 1998.

Thomas Krattenmaker  
Michelle M. Carey  
September 10, 1998  
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At the time of our conference call, I was unaware of the August 19, 1998 ex parte letter filed by MCI providing additional information and argumentation regarding the "private carriage" exemption — information which apparently also was presented to various members of the FCC's staff at an August 18, 1998 ex parte meeting attended by representatives of MCI, WorldCom and C&W. In addition, the August 19, 1998 MCI ex parte notes that the private carriage exemption was previously advanced by MCI and outside counsel for WorldCom during an August 7, 1998 teleconference with members of the FCC's staff.

MCI May Not Discontinue or Reduce Its Common Carrier Services and Provide Said Services to C&W as a Private Carrier Without Meeting the Procedural and Substantive Terms of Section 214 of the Communications Act

Let me say at the outset that Telstra strongly objects to the ad hoc and unlawful fashion in which proponents of the merger are currently seeking to resolve one of the central legal and public policy issues now before the Commission — namely, whether MCI may discontinue or reduce the public offering of various common carrier telecommunication services (e.g., international private lines (IPLs)) — in order to sell them privately to C&W on terms which have never been fully disclosed, and without any formal application or adequate public notice and opportunity for comment. Section 214 of the Communications Act as well as prior judicial and Commission precedent — most notably, Independent Data Communications Manufacturers Association, Inc., 10 FCC Rcd 13717 (Comm Carrier Bur. 1995), and Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) — bar the Commission from proceeding in this fashion, quite apart from the merits of the issue. There is simply no precedent for the "private carriage" exemption MCI, C&W and WorldCom now seek on an ex parte basis so as to shroud the discriminatory service arrangements negotiated between MCI and C&W from the formal Section 214 application process and appropriate Commission scrutiny under Sections 201 and 203 of the Communications Act.

As MCI and WorldCom would be the first to admit, this is not a "garden variety" merger and divestiture. At issue here is the public interest in combining two of the largest Internet backbone networks in the world, and the terms and conditions on which all competing Internet Service Providers (ISPs), including C&W, will have access to those backbone networks following the merger.

If MCI is permitted to craft a private carriage exemption for access to the basic common carrier services which form the core of that backbone (e.g., IPLs, backhaul and domestic transmission facilities), and to do so by end-running the public interest review required by Title II of the Communications Act, the FCC would become a regulatory cypher. Other large telecommunication carriers which offer IPLs and other common carrier backbone facilities to ISPs would quickly get the message, and the Internet backbone business would be placed

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September 10, 1998  
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outside the FCC's purview in short order. That may or may not be in the public interest, but the Communications Act does not permit it to occur by default.

It would be ironic indeed if, after a six month antitrust review designed to ensure, inter alia, that a combination of the MCI and WorldCom Internet backbone facilities will not adversely affect competition for Internet services, the Commission were to conclude its own docket by blessing a secret "private carrier" deal which will tilt the Internet services market in favor of one major ISP — C&W — and its network services supplier, MCI-WorldCom. That cannot be what the FCC's Chairman had in mind when he recently said that U.S. consumers would be best served if all providers of Internet and other advanced telecommunication services began at the same starting line. And that surely cannot be squared with Title II of the Communications Act.

The specific arguments which MCI advances in its August 19 ex parte letter to support a private carrier exemption are easily rebutted.

There Is No Precedent for the "Private Carrier" Exemption Claimed  
by the Merger's Proponents

First, the fact that the private carrier arrangement has been offered as part of a line of business divestiture so that MCI and WorldCom can satisfy antitrust concerns which U.S. and foreign authorities otherwise had regarding the merger should be given no deference by the FCC. No competition authority has required MCI or WorldCom to merge or to enter into the private carriage arrangement at issue here. These were private business decisions. And it is self-evident that the parties should not be permitted to implement these decisions by violating the Communications Act so as to avoid a potential violation of various competition laws.

Second, the argument that the telecom services at issue will be provided to C&W are unique because they are part of a larger asset sale is unconvincing. Crediting that argument would permit any company to craft a private carrier exemption merely by selling customer premises equipment along with basic telecom services. Moreover, a review of the underlying documents, to the extent they are available, shows that the parties themselves were readily able to separate the asset deal from the services deal — e.g., the Term Sheet references separate schedules for the telecom services at issue as well, apparently, as detailed route-by-route and service-by-service pricing terms. That may well be one reason why neither MCI nor C&W has fully disclosed the relevant contracts to the FCC.

Third, the principal cases cited in MCI's ex parte letter — NorLight, 2 FCC Rcd 132 (1987), and Southwestern Bell, supra — concerned the grant of private carrier status for services which had never been offered on a common carrier basis. Moreover, both cases involved formal FCC proceedings, and the U.S. Court of Appeals decision in the Southwestern Bell case makes it clear that the FCC may not simply presume that a service is a private or common

Thomas Krattenmaker  
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Page 4

carrier offering; it must duly investigate the facts for itself.<sup>1</sup>

Although the MCI *ex parte* makes much of the NorLight case, MCI wholly ignores the relevant Commission findings for the current docket. NorLight involved a consortium of Midwestern power companies which sought to offer service on a new interstate fiber optic network solely on a private carrier basis, and the service at issue had previously not been offered to the general public. Moreover, NorLight's owners were not regulated telecom carriers and hence were under no prior obligation to hold out said services to the public indifferently. In NorLight, the FCC also found that the public interest would not be harmed by classifying the enterprise as a private carrier because users would have access to ample common carrier facilities providing like services.

Here, by contrast, MCI seeks to withdraw a significant set of basic common carrier services from the public domain (e.g., IPLs and domestic trunk transmission services) and to reclassify them as private carriage solely for C&W's benefit. And, unlike NorLight, MCI is under a legal obligation to provide the IPL and other services at issue as a common carrier because it has held itself out as a common carrier for years. See, e.g., MCI Tariff FCC No. 1, Section C.2.012 (Dedicated Leased Line Digital Services).

Fourth, for various reasons, if MCI is permitted to discontinue the public provision of IPL and other common carrier facilities needed for Internet backbone access, similar common carrier substitutes may not be available and the precedent may be used by others unilaterally to withdraw like services from common carriage (i.e., without filing a Section 214 application). The post-merger company, MCI-WorldCom, will have significant power in the IPL market; the most recently available data shows that together the companies would control over 45% of the U.S. IPL market. Further, C&W, the beneficiary of the private carrier arrangement, has monopoly power on the foreign end in several markets (e.g., Jamaica, Bermuda and Hong Kong). Thus, by obtaining U.S. IPLs on favorable "private" terms from MCI, it would be able to exercise market power and discriminate against other entities seeking end-to-end IPLs. In addition, under the noncompete terms of the divestiture, as Telstra explained in its July 22 ex parte letter, MCI-WorldCom would be precluded from offering like IPL services to Telstra and other existing customers that are assigned to C&W.

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<sup>1</sup> See also MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988) (remanding an FCC order approving tariff principles which were asserted to be discriminatory by MCI because FCC failed to obtain the relevant tariff documents and make a factual comparison of the price terms vis-a-vis comparable services offered AT&T).

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Lastly, and perhaps most importantly, as stated at the outset, Section 214 of the Communications Act expressly states that "no carrier shall discontinue, reduce or impair service" unless the FCC has certified that "neither the present nor future public convenience and necessity will be adversely affected thereby . . . ." The courts have construed this requirement broadly. See, e.g., ITT World Communications Inc. v. New York Telephone Co., 381 F. Supp. 113 (S.D.N.Y. 1974). Neither MCI nor C&W have sought such a Section 214 certificate. Yet, MCI's prior description of the divestiture (e.g., the June 3 ex parte submission transmitted by MCI's Mary C. Brown, as well as the Term Sheet later filed in confidence) imply that C&W will receive the same (if not identical) basic telecommunication services which MCI now offers on a common carrier basis. In other words, the best available evidence strongly suggests that MCI will only be able to meet its "private carrier" commitments to C&W by discontinuing or reducing its existing common carrier services.<sup>2</sup>

In these circumstances, as the FCC and the courts have emphasized, the proponent of the private carrier service plainly has the burden of proceeding under Section 214 and demonstrating the public interest benefits of its contemplated action. As the D.C. Circuit stated in Southwestern Bell, "a carrier cannot vitiate its common carrier status merely, by entering into private contractual relationships with its customers." 19 F.3d at 1481 (citations omitted). For that and other reasons (e.g., to prevent the price discrimination banned by Section 201), the FCC has closely scrutinized the requests of existing carriers to withdraw or reclassify an existing common carrier service as private carriage. And, in the leading case to date, Independent Data Communication Manufacturer's Assn., supra — a case which MCI tellingly overlooks — the FCC denied AT&T the right to reclassify its frame relay backbone services as a "private carriage" service because, inter alia, AT&T had long provided the services pursuant to tariff. MCI has failed to show why the facts of its case are any different.

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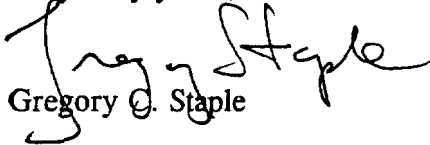
<sup>2</sup> This inference is also warranted from MCI's most recent description of the telecom services to be provided to C&W which, significantly, also makes no reference as to their "private carrier" status. Specifically, in a separate August 25, 1998 ex parte letter to the FCC's Secretary by MCI's Larry A. Blosser, MCI states that: "C&W is entitled to receive a specified amount of point-to-point private line capacity required to support the existing Internet network, as well as the projected growth in its Internet network. The capacity provided could be either dedicated to support the Internet networks or, depending upon routes and volumes, might be used by MCI to support other communications services in addition to C&W's Internet network." Id. at pp. 1-2. The generic nature and broad scope of the MCI services described here are, of course, quite at odds with the private carrier service arguments proffered by MCI but one week earlier.

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To summarize then, there is no factual or legal predicate for the private carriage exemption that MCI claims for the IPL and other basic telecommunication services it proposes to offer to C&W. Moreover, even if there were such a predicate, Section 214 of the Communications Act requires MCI and/or C&W to seek a certificate from the FCC which may not be granted absent prior notice and public comment, and a showing that the present and future public interest would be served by withdrawing said services from the common carrier domain. Enforcement of the procedural safeguards provided by Section 214 is especially important here because the services at issue will affect competitive access to the largest U.S. Internet backbone network for numerous Internet Service Providers in the U.S. and abroad

In view of the foregoing, it continues to be Telstra's view that any basic telecommunication services MCI proposes to offer C&W, including IPL services, must be provided pursuant to tariff, and accordingly must be unbundled and cost-based.

Very truly yours,



Gregory C. Staple

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Harold Furchtgott-Roth  
Commissioner Michael K. Powell  
Commissioner Gloria Tristani  
Christopher Wright, General Counsel  
Jeffrey Lanning, Office of General Counsel  
Kathryn C. Brown, Chief, Common Carrier Bureau  
Donald K. Stockdale, Common Carrier Bureau  
Michael Kende, Common Carrier Bureau  
Janice M. Myles, Common Carrier Bureau

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Applications of WorldCom, Inc. and  
MCI Communications Corporation for  
Transfer of Control of MCI  
Communications to WorldCom, Inc.

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CC Docket No. 97-211

COMMENTS OF SPRINT CORPORATION

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March 13, 1998

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SUMMARY

A combined WorldCom/MCI entity will create a powerful new Internet entity that will be able to exercise substantial dominance in the core Internet backbone market. Such dominance will likely reduce competition in this core market and, consequently, raise prices for Internet services.

There is no question of the Commission's jurisdiction here. The Commission's public interest responsibilities require it to examine the likely affect of a proposed merger on Commission policies promoting competition. Moreover, while services provided on the Internet may be enhanced, the direct threat to competition here is created by the consolidation of Worldcom's and MCI's core Internet backbone facilities over which such services are transported. As the Joint Applicants concede, these are basic, "garden variety" transmission facilities indistinguishable from those used to carry traffic on the PSTN.

Although the Joint Applicants claim that there are a plethora of Internet backbone providers vigorously competing with each other, such Internet providers are not comparable to the proposed merged entity. Internet backbone providers fall into two tiers. The first tier consists of core Internet backbone providers that offer ubiquitous Internet connectivity. They exchange traffic with each other on a settlements-free basis. The second tier of backbone providers typically rely on facilities obtained from core backbone providers to transmit

traffic. To reimburse the cost of these facilities, the second tier providers must pay for interconnection to the core providers' networks. The first tier of core Internet backbone providers comprise the relevant market here.

All available data establish that the combined WorldCom/MCI Internet backbone entity will become the overwhelmingly dominant provider of core Internet backbone services. In fact, the Joint Applicants' share of the core Internet backbone market post-merger will be approximately twice as large as the share of their nearest core backbone rival. This will create asymmetries in Internet connectivity and will, in turn, place at risk the current settlements-free peering arrangements among core providers. The WorldCom/MCI combination may be able to control access to the Internet backbone market in much the same way as an RBOC currently controls access to its in-region market. Under such circumstances, in the absence of competition, the Commission will be required to undertake the regulation of the Internet to ensure reasonable and non-discriminatory rates.

Sprint does not suggest that the Commission consider regulating the core Internet backbone market. Rather, Sprint believes that the Commission should adopt a structural solution in order to protect competition. Specifically, the Commission should require as a condition of the WorldCom/MCI merger, that the merging parties spin off either WorldCom's or MCI's Internet assets.

- Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

|                                    |   |                      |
|------------------------------------|---|----------------------|
| In the Matter of                   | ) |                      |
|                                    | ) |                      |
| Applications of WorldCom, Inc. and | ) |                      |
| MCI Communications Corporation for | ) | CC Docket No. 97-211 |
| Transfer of Control of MCI         | ) |                      |
| Communications to WorldCom, Inc.   | ) |                      |
| _____                              | ) |                      |

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, pursuant to the Commission's Order (DA 98-384) released February 27, 1998 in the above-captioned proceeding, hereby respectfully submits its Comments on the Joint Reply of WorldCom and MCI to Petitions to Deny and Comments filed January 28, 1998 (Joint Reply). As discussed below, the combined WorldCom/MCI entity will be able to exercise substantial dominance in the core Internet backbone market. Unless the Commission acts to prevent the accumulation of such market power by requiring structural changes as a condition for approving the proposed merger, e.g., through the divestiture of WorldCom's or MCI's Internet assets, it will be forced to regulate the core Internet backbone market to protect the public interest in much the same way as it is required at the present time to regulate the origination and termination of interstate calls on the Public Switched Telephone Network.

**I. INTRODUCTION: THE PROPOSED MERGER REPRESENTS A SEVERE THREAT TO THE COMPETITIVENESS OF THE CORE INTERNET BACKBONE MARKET.**

It is becoming increasingly clear that combining the Internet backbone networks of MCI and WorldCom (which has itself already combined its own Internet backbone network with those of UUNet, Compuserve and ANS) will likely reduce competition. At this point, there can be very little doubt that such a combination will result in a powerful new Internet entity, far larger than any of its core Internet backbone competitors, and perhaps larger than all of these competitors put together. The sheer size and scope of this consolidated Internet carrier relative to its competitors will provide it with a significant increase in market power that can be used to reduce competition in the core Internet backbone market and, consequently, raise prices for Internet services themselves.<sup>1</sup>

**II. THE COMMISSION PLAINLY HAS THE JURISDICTION TO CONSIDER THE COMPETITIVE IMPLICATIONS OF THE PROPOSED MERGER.**

The Commission's responsibility to determine whether a proposed merger is in the public interest includes the requirement that the Commission analyze the merger's likely

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<sup>1</sup>The Joint Applicants' position on the effect of the merger on the competitiveness of the Internet market is purely defensive. They argue only that the proposed merger will not "slow the dynamic growth" of the Internet or "diminish the vigorous competition among providers of Internet services." Joint Reply at 66. WorldCom and MCI do not present any serious justification for this claim and Sprint believes that they cannot.

effect "on Commission policies encouraging competition..." *Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd 19985, 20003

(¶32) (1997). If the Commission determines that a proposed merger is likely to lessen competition in violation of Section 7 of the Clayton Act, it has the authority under both the Communications Act and the Clayton Act to impose conditions on the merger as are necessary in the public interest to cure such violation. *Id.* at 20001 (¶29 and fn. 57).

Although the provision of Internet services will be adversely affected by the proposed merger, the direct threat to competition here involves only the transmission of the services, not the services themselves. There is no question as to the Commission's jurisdiction over such transmission. Although the services provided on the Internet may be, and typically are, enhanced, the underlying facilities over which they are transported are not. The WorldCom/MCI Joint Reply makes this very same point. It states:

The alleged source of any competitive issue presented by the MCI WorldCom merger arises from the transmission facilities which MCI and WorldCom would utilize to provide Internet services. These transmission facilities carry all kinds of traffic -- voice and data, circuit-switched and packet-switched -- and the transmission capacity used for Internet services is fully substitutable with capacity used for voice and other traffic. See Carlton/Sider Decl. ¶61.

Joint Reply at 71-72. Consequently, there is no reasonable basis for an argument that such "fully substitutable" facilities are beyond the Commission's jurisdiction simply because they are used to transmit Internet services.

On the other hand, although the facilities devoted to Internet use may be fungible with other facilities, this does not mean, contrary to the Joint Applicants' claim, that core Internet backbone service is not a separate market. Rather, a new provider -- or even an existing provider -- with all the facilities in the world cannot effectively compete in the provision of core Internet backbone service unless it can obtain access to other Internet subscribers, net sites, databases, servers, etc., located on the networks of other core Internet backbone providers. To the extent that a new or existing provider must rely for such access on another provider which has obtained significant market power relative to its competitors, it will be at a disadvantage in obtaining such access at a reasonable price, or perhaps at all. The existence of such a dominant provider of core Internet backbone service may make competition difficult, or even impossible, even though potential competitors have virtually unlimited access to the necessary facilities. Thus, while facilities may be substitutable, there are substantial barriers to companies seeking to enter the core Internet backbone market.

Nevertheless, Sprint does not suggest that the Commission consider regulating the core Internet backbone market. While there is no question that such regulation is legally permissible, there is also no question that it is ill-advised so long as viable competition exists. The best thing that the Commission can do is to protect such competition by requiring, as a condition of the WorldCom/MCI merger, that the merging parties spin off either WorldCom's or MCI's Internet assets.

Such divestiture -- and the concomitant protection of competition that it will afford -- is all that is needed to protect the public interest at this juncture. Internet backbone services have never been subjected to regulation by the FCC. Rather, the Internet backbone market has developed, indeed flourished, by virtue of the existence of the competitive market in which a core of similarly-sized backbone networks have exchanged and transited each other's traffic through settlements-free peering. However, the competitiveness of this market is threatened by the substantial increase in the size and market share of the core Internet backbone market that would be held by WorldCom/MCI after the merger. Thus, the proposed merger should not be permitted without requiring the divestiture of either WorldCom's or MCI's Internet assets, so that the merged entity does not acquire market power.

Sprint shares the concerns expressed by MCI and WorldCom in the Joint Reply about the extension of regulation to the Internet. Far from recommending such an extension, Sprint urges the Commission to prevent the necessity for regulation by applying a structural remedy which will help the core Internet backbone market to remain competitive.<sup>2</sup>

**III. WORLDCOM'S ACQUISITION OF MCI WILL ENABLE THE COMBINED ENTITY TO EXERCISE MARKET POWER IN THE CORE INTERNET BACKBONE MARKET.**

The addition of MCI's core Internet backbone network to the core backbone networks already amassed by WorldCom through its acquisitions of UUNET, ANS, and Compuserve will give the combined WorldCom/MCI entity significant market power and thereby enable it to raise the costs of its existing core backbone competitors and limit the entry of new competitors.

**A. The Current Structure Of The Core Internet Backbone Market.**

In order to better understand the likely competitive consequences of the proposed WorldCom/MCI merger on the provision of Internet services, it is perhaps useful to briefly describe the provision of Internet backbone services. The Joint

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<sup>2</sup>The European Commission has decided to open an inquiry into the proposed WorldCom/MCI merger because of concerns about the merged WorldCom/MCI's "combined market share in relation to the supply of Internet backbone services." Press Release entitled "Commission to carry out detailed inquiry into proposed merger between WorldCom and MCI," released March 4, 1998.

Applicants claim that as of the Fall of 1997, there were at least 37 national Internet backbone providers "competing vigorously with each other."<sup>3</sup> What they neglect to mention is that these so-called national Internet backbone providers are not comparable in size, scope, customer base, web sites connected their networks, or the services they can offer other ISPs.

As the market has evolved, Internet backbone providers fall into one of two tiers. The first tier consists of core Internet backbone providers that own and control their own networks; maintain nodes with default-free routers; exchange traffic with all other core backbone providers on a settlements-free basis (essentially a "bill-and-keep" system); interconnect at a minimum of five major national access points (NAPs) and on a private bilateral basis with other backbone providers and ISPs;<sup>4</sup>

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<sup>3</sup>Joint Reply at 74, citing the Fall 1997 edition of Boardwatch Magazine's "Directory of Internet Service Providers." Boardwatch concedes, however, that "[d]efining a national backbone is problematic at best" and that some of those entities claiming to have a national backbone are connected only in a few regional states. *Id.* at 8. Moreover, Boardwatch notes that at least some of the these "national" backbones are "pretty shaky." See, "The Big, The Confused and the Nasty" by Jack Rickard appearing in the June 1997 edition of Boardwatch at 4.

<sup>4</sup>Because of congestion and performance problems at the NAPs, the trend in the industry has been to enter into private bilateral interconnection arrangements between backbone providers. In any case, Bell Atlantic reports that there are currently 11 major NAPs in the United States and that WorldCom owns 5 of them, "including the two dominant NAPs, MAE East and MAE West." Petition to Deny at 11. The Joint Applicants challenge Bell Atlantic's figures and claim that there are currently 39 NAPs in operation in the United States. Joint Reply at 86-87. But they do not dispute Bell Atlantic's assertion that WorldCom owns the two dominant NAPs. Moreover, although they

and offer high-speed transmission facilities that connect their nodes and that transmit high volumes of Internet traffic both nation-wide and globally. Under the so-called "peering arrangements" among core Internet backbone providers, these providers will only deliver traffic to each other that is destined for the core provider's end users or ISPs' customers. Access to any one of the core backbone providers offers ubiquitous Internet connectivity.

The second tier of backbone providers also maintains nodes with default-free routers and offers transmission facilities -- albeit at lower speeds than those of core providers -- connecting their nodes. However, they typically rely on facilities obtained from core backbone providers to transmit traffic throughout the United States and to other countries. Because the core backbone providers offer services to them that are costly to provide, the second tier providers must pay for interconnection to the core providers' networks.<sup>5</sup>

Core Internet backbone services comprise a relevant antitrust market. Access to any core backbone provider permits any Internet user to reach any other Internet user through the

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claim that the cost of establishing a NAP is low, they offer no cost data to document such claim.

<sup>5</sup>The overwhelming majority of ISPs do not maintain their own networks but obtain Internet connectivity from backbone providers.

interconnection arrangements that exist among core providers. Although there may be other routing arrangements through which Internet users can interconnect with one another, these alternatives are vastly inferior to access through a core backbone provider. Thus, a hypothetical monopolist that controlled the core Internet backbone market would be able to raise the price of access service. Under the *Horizontal Merger Guidelines* of the Department of Justice and Federal Trade Commission (issued April 2, 1992 and revised April 8, 1997), the ability of a hypothetical monopolist to raise prices is sufficient to demonstrate that the provision of core Internet backbone services is a relevant antitrust market.

Currently, there are four core backbone providers: WorldCom, MCI, Sprint, and GTE (through its ownership of BBN). These core backbone providers compete vigorously to provide facilities to Tier 2 backbone providers as well as to other ISPs. Such competition enables the Tier 2 providers and other ISPs to obtain access to core Internet backbone facilities at reasonable rates.

**B. With Its Acquisition of MCI, WorldCom Will Command An Overwhelming Share Of The Core Internet Backbone Market.**

Plainly, the market structure described above would change if WorldCom were to acquire MCI and MCI's core Internet backbone network. All available data establish that the combined WorldCom/MCI Internet backbone entity will become the overwhelmingly dominant provider of core Internet backbone services. Based upon survey data compiled by Boardwatch (see, "The Big, The Confused and the Nasty" by Jack Rickard in the June 1997 issue), about 41 percent of non-backbone ISPs are currently connected to the MCI backbone and about 23 percent are currently connected to the UUNet, ANS, and Compuserve backbones, so that 64 percent of all non-backbone ISPs would be connected to WorldCom/MCI after the merger. Similarly, MCI currently has about 35 percent and UUNet/ANS/Compuserve currently have about 20 percent of total connections, so that the combined WorldCom/MCI would have about 55 percent of all connections after the merger.<sup>6</sup> By way of comparison, Sprint, the next largest core backbone provider, will reach only about 31 percent of the ISPs and have only 26 percent of total connections. Thus, the WorldCom/MCI entity will have twice the market share in this regard as its nearest competitor.

Other sources of information also confirm the dominant position that a combined WorldCom/MCI entity would command in the provision of core Internet backbone services. For example, according to the January 19, 1998 edition of Internet Week, MCI currently carries 26 percent of Internet backbone traffic. WorldCom's UUNet currently carries 20 percent of such traffic and, when added to the backbone traffic carried by other WorldCom entities, e.g., ANS and Compuserve, WorldCom's current share of Internet backbone traffic increases to 28 percent. Because the combined WorldCom/MCI entity would carry 54 percent of all backbone traffic after the merger, such combination would drastically change the structure of the core Internet backbone market. Bell Atlantic also has introduced evidence into this proceeding showing that post-merger, WorldCom/MCI's share of Internet backbone traffic would range anywhere from 49 percent to near 80 percent. Bell Atlantic Petition to Deny at 5.<sup>7</sup>

In their Joint Reply, WorldCom and MCI not only dispute the fact that there is a discrete market for core Internet backbone service, they also specifically challenge some of the share estimates of such market that were submitted by Bell Atlantic

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<sup>6</sup>Although the share of total connections may not correspond exactly to the appropriate market share, it is likely to be highly correlated with it.

<sup>7</sup>The Department of Justice is currently compiling additional information from carrier tests and measurements conducted the week of March 1, 1998, which may shed additional light on market shares.